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No. 48

In the Supreme Court of the United States

October Term, 1951

New Braun Ice Company,
a Corporation,
Appellant,

vs.

Ernest A. Lindsley,
Appellee.

BRIEF OF THE APPELLEE

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NO. 463

In the Supreme Court of the United States

OCTOBER TERM, 1931

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

BRIEF OF THE APPELLEE

STATEMENT OF THE CASE

The appellant's statement of the case is substantially correct so far as it goes but counsel have omitted certain facts brought out by the evidence on behalf of the appellee which we deem material to a complete understanding of this case.

Appellant mentions only the evidence of the appellee himself and fails to include in the statement the evidence of certain witnesses, a summary of which evidence is found on pages 22, 23 and 24 of the record and we desire to supplement the appellant's statement by calling the court's attention to the evidence of O. W. Bartell (p. 22) who testified that he was engaged in the dairy business in Okla-

homa county; that he bought ice prior to 1925 at 25 cents per hundred; that ice was delivered at his door at the present time for 40 cents a hundred; that he knew nothing of any agreement prior to June, 1925 as to prices among ice manufacturers; that formerly he bought ice where he could buy it cheapest and that there were probably three plants soliciting his business in 1925; that he did not know that the Corporation Commission was regulating the price of ice in Oklahoma City prior to 1925.

The evidence of T. F. Hurt (p. 22) who testified that he lived in Oklahoma City and was in business therein; that he has been a dairyman for about twenty years; that prior to June, 1925 he paid $4.00 per ton for ice at the docks from the New State, the Crystal and the Big Four plants; that at present he made his own ice; that he started making his own ice because ice was raised from $4.00 to $7.00 a ton after this law went into effect.

The evidence of R. D. Davis (p. 23) shows that he resided in Bethany, Oklahoma; that he had been in the ice business in 1924 and 1925; that he did not manufacture ice but bought ice from Mr. Liebmann and the New State Ice Company in Oklahoma City prior to the passage of the act of 1925 for 30 cents a hundred at the docks; that the next spring ice in Bethany sold for 60 cents a hundred delivered and 50 cents a hundred at the docks.

John Brasier testified (p. 23) that from 1910 to 1928

he was engaged in the ice business, buying wholesale and selling retail to his customers; that prior to June, 1925, he paid 25 cents a hundred at the manufacturers' docks and bought from the Big Four, Crystal Ice and Ice Cream Company and New State; that after June, 1925, he paid 35 cents a hundred.

The evidence of S. B. Farnham (p. 23) who testified that he had been in the ice business for 15 years in Iowa; that from his experience ice could be shipped from 50 to 75 miles in a good tight refrigerator car; that he was not acquainted with conditions in Oklahoma City but could not see any material difference between manufacturing and selling ice and the preparation and sale of meat or the baking and selling of bread; that nothing was used in the manufacturing of ice that was injurious to the public health; knew nothing about the business that was injurious to the public welfare or morals; did not require expert skill to operate an ice plant; a man of average intelligence could learn to operate a plant.

George Winchell (p. 24) testified that he was employed by the Sherman Machine and Iron Works as refrigerating engineer; that his employers were agents for ice-making or refrigerating machines; that the process of manufacturing ice was chilling water to the freezing point and some system of agitation, in the case of raw water, to make it freeze clear; that there was nothing in the machinery or any

ingredient placed in the water that was injurious to the public health; that there was a slight decrease in the price of ice manufacturing machinery since June, 1925, but the machines had been simplified; that many big establishments manufactured their own ice; that he could see but little difference between the sale and delivery of ice and other manufactured products—for instance, meat might spoil; ice just melts.

From the pleadings and evidence it will be observed that appellant is manufacturing and selling ice in Oklahoma City; that it held a permit, or license, granted by the Corporation Commission of the State of Oklahoma, under the provisions of Chapter 147, Session Laws of Oklahoma, 1925, which appellant claims constitutes a franchise. The appellee has erected an ice plant, under a building permit issued by the city, and is manufacturing and selling ice without having first secured a permit so to do from the Corporation Commission.

The appellant alleges that the manufacture and sale of ice is a public business, as defined by Section 11032, Compiled Statutes of Oklahoma, 1921, and a public utility, and if defendant is permitted to engage in the ice business without a permit or license so to do, it will be deprived of its property without due process of law.

Appellee denies that said permit constitutes a franchise, and denies that appellant will be deprived of its

property rights by him engaging in business without a permit. He alleges that the manufacture and sale of ice is a private business, not clothed with a public interest, and does not render a public service; does not exercise the right, and has not the power, of eminent domain; does not require the use of the streets nd highways in any manner not used by the public at large; is not injurious to the public health, safety or morals. That it is a useful and necessary occupation, and that unless he is permitted to engage in the ice business and to use his property for that purpose, he will be deprived of his property rights in violation of the Constitution of the United States, and the Constitution of the State of Oklahoma, and he alleges that the Act of the Legislature of the State of Oklahoma, known as the Ice Act, being Chapter 147, Session Laws of 1925, is in violation of the rights guaranteed to him under Section 10 of Article 1, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The evidence discloses that the appellee has been engaged in the business of manufacturing and selling ice since 1903; that he has erected a small ice plant of between 25 and 30 tons daily capacity under a building permit granted him by the City; that the cost of said plant is approximately $40,000.00; that said plant is what is known as a one-man plant; that is, one man operates it.

The evidence further discloses that it does not require

any unusual skill to operate a modern raw water ice plant; that ice can be manufactured cheaper than it could in and prior to 1925; that the equipment is simpler to operate, more ice can be handled with an electric hoist than before; that the ice business is merely manufacturing and selling a product; that said business does not differ in its general conduct from that of the butcher, grocer or baker; that there is no material difference between the manufacturing and selling of ice and the preparation and sale of meat, or the baking and selling of bread; that there is nothing about the business that is injurious to the public health, welfare or morals; that from 30% to 40% of the ice manufactured was sold at the plant, the customers coming for it; that in the conduct of the business no different use of the streets was required than that of the public at large; that there is no material difference between a commercial ice plant and a home refrigerating plant, the principle is the same, and both are simple in their construction and operation; that there are a great many individual ice plants in Oklahoma; that many hotels, restaurants, meat markets and hospitals and dairymen have their own plants.

It is further disclosed that prior to 1925 there was no monopoly in the ice business; that there was no agreement between the manufacturers as to the price of ice; that at the time the act under consideration was passed there were eight plants in Oklahoma City owned by six companies; that

there are now eleven plants owned by three companies; that the price of ice is higher than it was prior to the passage of the Act.

ARGUMENT.

The Act of the Legislature of the State of Oklahoma, approved April 7, 1925 (being Chapter 147 Session Laws of Oklahoma, 1925) is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Act referred to is set out at length in the brief of Appellant, and will not be repeated here.

Section 1 of this Act declared the ice business to be a public business, as defined by Section 11032 of the Oklahoma Statute, which reads as follows:

> "Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such manner as to make it of public consequence or to affect the community at large as to the supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by this state, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon

reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

This section of the statute was construed by the Supreme Court of the State in *Oklahoma Gin Company v. State*, 63 Okla. 10, 158 Pac. 629, as applying only to those businesses which were conducted in violation of Section 11017 of the Compiled Statutes, which reads:

"Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal."

In that case the Supreme Court of the State said:

"When the Legislature by Section 1 of the Act denounced every act, agreement, contract, or combination, in whatsoever form and every conspiracy in restraint of trade within the State as illegal, and in Section 13, 11082, provided, among other things, that:

"'Whenever any business (within the State) * * * is such that the public must use the same, or its services, * * * or (whenever) the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or (in such manner as) to effect the community at large as to supply, demand or price or rate thereof, or (and) said business is conducted in violation of the first section of this Act, said business is a public business, and (is) subject to be controlled, * * * by the Corporation Commission,' it meant that whenever a business, although organized, it may be, for the purpose of private gain, has placed its property in such a position that the public has become interested in its use and such business is conducted in violation of Section 1 of

the Act, *i. e.*, governed by a trust, monopoly, or combination or conspiracy in restraint of trade, the same was, by the Act, declared to be a public business, and made subject to the control of the Corporation Commission. Speaking to said section, in *Shawnee Gas & Elect. Co.* v. *Corporation Commission*, 35 Okla. 434, 130 Pac. 127, quoting approvingly from an unpublished opinion of Hayes, J., we said:

" 'This section provides that whenever a business shall have certain characteristics, it shall be a public business, and shall be subject to the jurisdiction of the Corporation Commission to regulate its practices, rates, and prices; but it does not provide that all public business shall be subject in these respects to such jurisdiction. * * * The first part of said section attempts to define the class of business which the latter part of the section subjects to the jurisdiction of the Corporation Commission and the district courts. It appears to us clear that what was intended was to bring within the jurisdiction of the Commission the regulation of charges and rates for services connected with those businesses that violate the Acts and are connected, not with business strictly of a public character, such as common carriage, supply of water and gas, but with that class of business in which the owners, without any intent of public service, have placed their property in such a position that the public has an interest in its use. The distinction between the class of business and its service intended to be defined by and included in said section and the business and service of public corporations, is, we think, well made by Mr. Justice Brewer, who delivered the opinion of the court in *Cotting* v. *Goddard*, 183 U. S. 72, 22 Sup. Ct. 30, 46 L. ed. 92, in the following language: 'In the one (referring to property devoted to public service) the owner has intentionally devoted his property to the discharge of a public service. In the other, he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in

its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself; in the other, that he submits to only those necessary interferences and regulations which the public interest requires.'' It was this second class of business with which we think Section 13, was dealing and intended to place under the jurisdiction of the Corporation Commission and the district courts of the State as to all practices, rates and charges. * * * The Act confers, not only upon the Corporation Commission jurisdiction to prescribe rates and charges under the conditions therein named, but confers also a like and concurrent power upon the district courts of the State.' ''

Sections 11017 and 11032 of the statute are a part of the anti-trust act, and unless the manufacture and sale of ice falls within the provisions of this Act, Chapter 147, S. L. 1925, the Ice Act, is without effect. This Act does not declare ice plants to be public utilities, nor does it declare the manufacture and sale of ice to be a public business, except as defined by Section 11032.

This section authorized the Corporation Commission, or any district court of the State, to regulate any business that is violating the provisions of 11017. A business may violate that section whenever, by reason of its nature, there is a monopoly, if it is such that the public must use the same, or its commodities bought or sold in such a manner

as to make it of public consequence. This is the holding of the court in *Oklahoma Light & Power Co. v. Corporation Commission, et al*, 96 Okla. 19, 220 Pac. 54, where it is said:

> "Whether or not the manufacture, sale, and distribution of ice within any city or community is conducted in such a way and to such an extent as to bring it within the statutory characteristics and subject it to regulation by the Corporation Commission is dependent upon the established facts in a proper hearing before the Commission for the regulation of such business, and if upon such hearing the evidence shall disclose such a state of facts as would bring such business within the statute, the Commission would have jurisdiction to regulate the rates in the distribution of ice."

We respectfully submit that the proof in this case shows that prior to the passage of the Ice Act, there was no monopoly in the ice business. Nor was the public compelled to use the ice sold by any particular ice plant, or manufacturer. Nor was ice bought and sold in such a manner as to make it of public consequence. True, the secretary of the ice association testified he had numerous complaints from patrons of ice companies. Some complaining of the quality of the ice, some of the price, and others of the manner and time of delivery. There was also some proof to the effect that in a few instances where two ice plants were operating in one town, one of the plants became bankrupt and the other purchased it at a small price. This falls far short of proof that the manufacturing and selling of ice in Oklahoma City is a public business as defined in Sections 11017 and 11032 of the statute.

Whether a business is public or private, or clothed with a public interest, is for the courts to determine.

The legislative declaration that a business is affected with a public interest, is not conclusive of the question whether attempted prohibition and regulation on that ground is justified, but the question is always one of judicial inquiry. *Wolff Packing Company* v. *Court of Industrial Relations of Kansas,* 262 U. S. 522, 43 Sup. Ct. R. 630, and *Tyson and Brother* v. *Banton,* 273 U. S. 418, 47 Sup. Ct. R. 426.

In the Wolff Packing Company case Chief Justice Taft, in delivering the opinion, said:

"Business said to be clothed with a public interest justifying some public regulations may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers, and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislature for regulating all trades and callings. Such are these of the keepers of inns, cabs and gristmills. *State* v. *Edwards,* 86 Me. 102, 29 Atl. 947, 25 L. R. A. 504, 41 Am. St. Rep. 528; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 254, 3 Sup. Ct. 583, 60 L. ed. 984, Ann. Cas. 1916D 765.

"(3) Businesses, which, though not public at their

inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use, it subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 4 Sup. Ct. 48; 28 L. ed. 173; *Budd* v. *New York*, 117 N. E. 1, 27, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *Id.*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247; *Brass* v. *Stoeser*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A 487; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011, L. R. A. 1915C 1189; *Van Dyke* v. *Geary*, 244 U. S. 39, 47, 37 Sup. Ct. 458, 65 L. ed. 865, 16 A. L. R. 165.

"It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'Clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a com-

modity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raised implications of an affirmative obligation on their part to be reasonable in dealing with the public."

And the court further says:

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, of the baker, the tailor, the wood-chopper, the mining operator, or the miner, was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true, that in the days of the early common law an omnipotent parliament did regulate prices and wages as it choose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

"An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes. *United States* v. *Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; *Terminal Cab Co.* v. *Kutz*, 241 U. S. 252, 256, 36 Sup. Ct. 583, 60 L. ed. 984, Ann. Cas. 1916D 765, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011, L. R. A. 1915C 1189, it usually distinguishes private from quasi-public occupations."

In the case of *Lawton* v. *Steele*, 152 U. S. 133, 14 S. C. R. 499, this Court said:

"The legislature may not, under the guise of pro-

tecting the public interest, arbitrarily interfere with private business, or impose unusual or unnecessary regulations upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. In *Jusnetzky* v. *Security Ins. Co.* (Mo.), 281 S. W. 47, A. L. R. 189, it was held that it is not within the power of the legislature to forbid a man to transact any business otherwise perfectly lawful. Such a right was held to be guaranteed by a provision that 'all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry.' "

The use of ice and the volume of business not sufficient to clothe the business with public interest.

Considerable proof was offered as to the extensive use of ice in the preservation of foods, and the shipment of meats and vegetables, also as to the increased output and sale of ice in the State of Oklahoma during the last several years. That ice is generally used in the preservation and preparation of various foods and drinks, including milk for the babies, as testified by the learned chemist, must be admitted by the appellee. But this does not prove the ice business to be a monopoly, or a commodity that must be purchased by the public, or a public utility, nor authorize the legislature to prohibit the defendant from engaging in the business without a permit from the Corporation Commission.

There was also proof, by the secretary of the Ice Men's

Association, to the effect that since the passage of the Ice Act, the members had greatly improved their service to the public and were manufacturing a better quality of ice, with improved machinery. All of which could have and should have been done prior to the passage of the Act.

Ice plant not public utility.

There is no statute of this State declaring ice plants public utilities. In *Mott on Due Process of Law*, page 533, it is said:

> "The difficulty inherent in this view is clearly shown in the cases involving the validity of municipal ice plants. In certain localities, there can be no question that ice is a necessity. Without adequate refrigeration, life would be intolerable, and it is ever conceivable that the public health would be endangered. Upon this basis the Supreme Court of Georgia upheld an act permitting municipalities to build their own ice plants. But the real question in the case seems to be whether private enterprise can and has furnished ice in sufficient quantities to protect the public necessity. In other words, is an ice plant a public utility? That it is not, is obvious, and for this reason municipal ice plants have been held unconstitutional in Louisiana and Missouri."

The ice man is not compelled by any Act of the legislature to sell his product. He is not furnishing a service. He is not guaranteed any return on his investment. A public utility is required to serve the public, and its rates fixed so as to guarantee a reasonable return on the invest-

ment, including operating expenses. The ice manufacturer may sell or not sell as he sees fit. It is in proof that an increasing number of individuals and corporations are manufacturing ice for their own use.

We may admit, for argument's sake, that ice is a family necessity. So is meat, bread, sugar, coffee, tea, and potatoes.

The fact that competition might result in the bankruptcy of one plant and thereby permit the other to increase the rates, is no argument in favor of the constitutionality of the Ice Act, conceding the importance of ice in the home and as generally used. Much the same argument was made to sustain the Act in question in *Fairmont Creamery Co.* v. *State of Minnesota*, 274 U. S. 1, 47 Sup. Ct. Rep. 506. In that case the Act of the legislature controlled the purchase and sale of cream. It was argued that unless the price of cream was controlled, the powerful buyers would destroy competition. The Act was held unconstitutional. In that case this court said:

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> "As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts, long regarded, not only as essential to the freedom of

trade and commerce, but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. Enforcements of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish for all points, without regard to ordinary trade conditions.

"The real question comes to this: May the State, in order to prevent some strong buyer of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights, whose exercise does not ordinarily produce evil consequences, but the reverse."

In the case of *Ribnik* v. *McBride*, 277 U. S. 350, 48 Sup. C. R. 545, this court held the statutes of New Jersey, empowering the State Commission of Labor to fix prices which an employment agent should charge for his services, violative of the due process of law clause of the Fourteenth Amendment, as such business was not affected with a public interest. In the opinion it was said:

"An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer and the apartment or tenement house owner, and the broker who acts as intermediary between such owner and his

tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. *Wolff Co.* v. *Industrial Court, supra,* page 536 (43 S. Ct. 630). Under the decisions of this court it is no longer fairly open to question that, at least in the absence of a grave emergency (*Tyson & Brothers* v. *Banton, supra,* pages 431, 437, 47 S. Ct. 426), the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place."

The volume and extent of the business does not determine its character. In the case of *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 49 Sup. Ct. R. 115, this Court declared invalid an Act of the Legislature of Tennessee providing for fixing the price of gasoline. It was there held that such business is not affected with the public interest. In that case it was said:

"It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.'

Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522, 43 S. Ct. 630, 67 L. ed. 1103, 27 A. L. R. 1280; *Tyson & Brother* v. *Banton, supra*; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 47 S. Ct. 506, 71 L. ed. 893, 55 A. L. R. 163; *Ribnik* v. *McBride*, 277 U. S. 350, 48 S. Ct. 545, 72 L. ed. 913. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this Court, beginning with *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. *Tyson & Brother* v. *Banton, supra*, 273 U. S. 434 (47 S. Ct. 426). Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. *Id.*, 273 U. S. 430 (47 S. Ct. 426). The meaning and application of the phrase are examined at length in the Tyson case, and we see no reason for restating what is there said.

"In support of the Act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by

merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case.

"There is nothing in the point that the Act in question may be justified on the ground that the sale of gasoline in Tennessee is monopolized by appellees, or by either of them, because, objections to the materiality of the contention aside, an inspection of the pleadings and of the affidavits submitted to the lower court discloses an utter failure to show the existence of such monopoly."

In the business of manufacturing and selling ice can be said to be subject to government regulation at all, it falls within the third class mentioned in the Wolff Packing Company case, "Businesses which, though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulations."

Power to regulate, not to prohibit.

The power to regulate prices does not, necessarily, carry with it the power to prohibit from engaging in the business. Prior to the Ice Act the Corporation Commission was regulating the ice business, under Sections 11017 and 11032 of the statute, but was not granting or refusing permits to engage in the business. The Commission was regulating only where it was made to appear that a

monopoly existed or an unfair price was being charged to the buying public. The State may or may not have the power to regulate the price to be charged. That question is not presented here. Complainants seek here to prevent the defendant from entering the business in competition with them.

The right to prohibit was involved in the case of *Adams* v. *Tanner*, 244 U. S. 590, 37 Sup. Ct. R. 662, where an Act of the Legislature of the State of Washington was called in question. The Court, in holding the Act unconstitutional, said:

> "Prohibition, not regulation, is what is accomplished by the provisions of the Washington Employment Agency Law (Wash. Laws 1915, Chap. 1), making it criminal to collect fees from workers for furnishing them with employment or information leading to such employment, although fees may still be collected from those seeking workers.
>
> "The right of the individual under U. S. Const., 14th Amend., to engage in a useful and lawful business is unwarrantably infringed by the provisions of the Washington Employment Agency Law (Wash. Laws 1915, Chap. 1), enacted in the purported exercise of the police power, which make it criminal to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee for furnishing such person with employment or with information leading thereto."

In commenting on the question the Court said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for

hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

In *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 46 Sup. Ct. Rep. 320, the Court said:

"The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger* v. *Wisconsin*, 46 S. Ct. 260, 270 U. S. 230, 70 L. ed. 557. The business here involved is legitimate and useful, and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment. *Adams* v. *Tanner*, 37 S. Ct. 662, 244 U. S. 590, 596, 61 L. ed. 1336, L. R. A. 1917F 1163, Ann. Cas. 1917D 973; *Meyer* v. *Nebraska*, 43 S. Ct. 625, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446; *Burns Baking Co.* v. *Bryan*, 44 S. Ct. 412, 264 U. S. 68, L. ed. 813, 32 A. L. R. 661."

In *Burns Baking Company et al.* v. *Bryan*, 264 U. S. 504, 44 Sup. Ct. Rep. 412, the court had under consideration an Act of the Legislature of Nebraska prohibiting the sale of loaves of bread other than of a given weight, and it was there held:

"A state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions on them.

"Where a constitutional protection is invoked, it is the court's duty to determine whether the challenged provision has reasonable relation to the evil sought to be prevented, and really tends to accomplish the purpose for which it was enacted."

In *Myers* v. *State of Nebraska,* 262 U. S. 390, 43 Sup. C. R. 625, the court in discussing the rights guaranteed by the Fourteenth Amendment, said:

"The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment:

"'No State * * * shall deprive any person of life, liberty or property without due process of law.'

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restrain, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognizant at common law as essential to the orderly pursuit of happiness by free men. *Slaughterhouse Cases,* 16 Wall. 36, 21 L. ed. 394; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 4 Sup. Ct. 652, 28 L. ed. 585; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 Sup. C. R. 1064, 30 L. ed. 220; *Minnesota* v. *Barber,* 136 U. S. 313, 10 Sup. Ct. 862, 34 L. ed. 455; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 17 Sup. Ct.

427, 41 L. ed. 832; *Lochner* v. *New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937, 3 Ann. Cas. 1133; *Twining* v. *New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97; *Chicago, B. & Q. R. R.* v. *McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. ed. 328; *Traux* v. *Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131, L. R. A. 1916D 545, Ann. Cas. 1917B 283; *Adams* v. *Tanner*, 224 U. S. 590, 37 Sup. Ct. 662, 51 L. ed. 1336, L. R. A. 1917F 1163, Ann. Cas. 1917D 973; *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357, 38 Sup. Ct. 337, 62 L. ed. 772, Ann. Cas. 1918E 593; *Traux* v. *Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. ed. 254; *Adkins* v. *Children's Hospital* (April 9, 1923), 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. —; *Wyeth* v. *Cambridge Board of Health*, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, 23 L. R. A. (N. S.) 147. The established doctrine is that the liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton* v. *Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385."

In *Smith* v. *Texas*, 233 U. S. 630, 34 Sup. Ct. Rep. 681, a statute of Texas making it a misdemeanor for any person to act as a conductor on a freight train in that state without having previously served for two years as a conductor or brakeman on such trains was declared unconstitutional. Although this involved the employee of a common carrier conceded to be a quasi-public business, the court said:

"Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those sepa-

rate and independent rights may lessen or extinguish the value of the other three. Insofar as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

"If the service is public, the State may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. *Re Lookwood,* 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; *Hawker* v. *New York,* 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Watson* v. *Maryland,* 218 U. S. 173, 54 L. ed. 897, 30 Sup. Ct. Rep. 644. The private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the State may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But, as the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object, and so as not unduly to 'interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' *Lawton* v. *Steele,* 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499."

Louis K. Liggett Co. v. *Baldridge et al.,* 278 U. S. 105, 49 Sup. Ct. Rep. 57, involved the validity of a statute of Pennsylvania requiring every pharmacy to be owned by licensed pharmacists, and in case of corporations, associations, and co-partnerships, requiring all partners or members to be licensed pharmacists, except as to those already

engaged in such business. The court held said statute violative of the Fourteenth Amendment, and stated:

> "A State cannot, 'Under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513, 44 S. C. 412, 413 (68 L. ed. 813, 32 A. L. R. 661). See, also *Meyer* v. *Nebraska*, 262 U. S. 390, 400, 43 Sup. Ct. 625, 67 L. ed. 1042, 29 A. L. R. 1446; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70, 74, 44 Sup. Ct. 439, 68 L. ed. 904; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534, 535, 455 Sup. Ct. 571, 69 L. ed. 1070, 39 A. L. R. 468; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 412-415, 46 Sup. Ct. 320, 70 L. ed. 654; *Fairmont Co.* v. *Minnesota*, 274 U. S. 1, 9-11, 47 Sup. Ct. 506, 71 L. ed. 893, A. L. R. 163."

Algeyer et al. v. *State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. R. 427, involved a statute of the State of Louisiana entitled "An Act to prevent persons, corporations or firms from dealing with marine insurance companies that have not complied with law," and the court in holding the statute unconstitutional, said:

> "'Liberty,' as used in the provision of the Fourteenth Amendment to the Federal Constitution, forbidding the States to deprive any person of life, liberty, or property without due process of law, includes, it seems, not merely the right of a person to be free from physical restraint, but to be free in the enjoyment of all of his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to carry out the purposes above mentioned.

"A State statute which, as construed by the highest State court, prohibits a citizen of the State, under an open policy of marine insurance, effected outside the State, in a foreign insurance company which has not complied with the State laws, from sending by mail or telegraph, while in the State, a notice describing particular goods then within the State, upon which he desires the insurance under the open policy to attach (Act La. 1894, No. 66), operates to deprive such citizen of his liberty without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution. 18 South. 904, reversed."

In the case of *Butchers' Union* v. *Crescent City*, 111 U. S. 746, 4 S. C. R. 652, the court said:

"The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution. It is what no Legislature has the right to do; and no contract to that end can be binding on subsequent legislatures."

Justice Field said in a concurring opinion:

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to

pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.

"It cannot be that a State may limit to a specified number of its people the right to practice law, the right to practice medicine, the right to preach the gospel, the right to till the soil, or to pursue particular business or trades, and thus parcel out to different parties the various vocations and callings of life. The first Section of the Fourteenth Amendment was, among other things, designed to prevent all discriminating legislation for the benefit of some of the disparagement of others; and when rightly enforced as other prohibitions upon the State, not by legislation of a pemal nature, but through the courts, no one will complain."

Appellant admits that the permit under which it is operating is not exclusive. The Corporation Commission might issue a permit to the defendant and the issuance of such permit would not cancel the permit under which appellant operates. It alleges it will be deprived of its property rights if defendant operates without a permit. If his operation in competition with appellant would deprive it of its property, this damage would result with a permit as well as without. Since the State does not guarantee to appellant a reasonable return on its investment, it cannot be heard to complain of competition. If the effect of the Act is to destroy and prevent competition, it violates the provisions of the Constitution for that reason.

Appellant has no property right in the right to sell ice

without competition. It was so held by the Supreme Court of Oklahoma in the case of *Choctaw Cotton Oil Company* v. *Corporation Commission*, 121 Okla. 51, 247 Pac. 390. Under the provision of the statute in question there the Corporation Commission must find a necessity for a gin before granting a permit. But the statute also has provisions to the effect that where one hundred taxpayers petition therefor, the Corporation Commission must grant the license and it was of this provision the established gin complained. It was argued there that the grant of a permit, without a showing of necessity, would deprive the established gin of its property rights. In discussing the question it was said:

> "What property rights are taken from petitioners by licensing another gin under the foregoing proviso? What rights of any kind could the licensing of another gin effect? It does not disturb the property of petitioners, nor prevent the free operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the State or Federal Constitution, hence the contention as to taking their property without due process of law cannot be sustained."

Decisions of State Courts.

Many State courts have passed upon kindred questions, holding statutes invalid as violative of the Fourteenth Amendment or of the provision of the State Constitutions that no person shall be deprived of life, liberty or property without due process of law; among these decisions are:

State v. *Santee,* 111 Iowa 1, 82 N. W. 445, A. S. R. 489, wherein the Court declared unconstitutional a statute providing for the use of gas manufactured from petroleum and further requiring a person to use a particular lamp, when others equally safe were in the market, and among other things said:

> "Exclusive privileges and franchises may, no doubt, be granted, when absolutely necessary to insure safety to the people, but not otherwise; see *Slaughter House Cases,* 16 Wall. 36. In this case the parties agree, however, that there are other lamps, operated on the same general principle as the Welsbach, that are equally safe, and that secure the same results. This being true, the Legislature has no power to select one and reject the other. To do so would be to create the most odious of monopolies. The statute under consideration was enacted in virtue of the police power of the State, but the Legislature cannot under this guise, create a monopoly; *Yick Wo.* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1064; *State* v. *Cincinnati, etc., Coke Co.,* 18 Ohio State, 262; *Mayor, etc.,* v. *Thorne,* 7 Paige 261; *Norwich Gaslight Co.* v. *Norwich City Gas Co.,* 25 Conn. 19. The business of manufacturing lamps, or the use of gas or vapor for illuminating purposes, is not unusual, and does not demand primarily on governmental permission."

In The Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636, a statute was declared unconstitutional which made it a misdemeanor to manufacture cigars in cities of more than 500,000 inhabitants in any tenement house occupied by more than three families, except on the first floor of houses in which there is a store for the sale of cigars and tobacco. The court, among other things, said:

"Under the guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an Act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty then it is for the courts to scrutinize the Act and see whether it really relates to and is convenient and appropriate to promote the public health."

In *Hall* v. *Nebraska*, 100 Nebr. 84, L. R. A. 1916F 136, a statute prohibiting the sale of hog cholera serum was declared unconstitutional on the ground that any person has the right to adopt and follow any lawful industrial pursuit which is not injurious to the community. The court treated the monopoly feature of the law, saying:

"The Act creates a combination in restraint of trade. It permits the manufacturers of serum to monopolize the entire business of selling it in the State. It also makes it unlawful for any other person than the makers of serum to sell and vend it.

"If this law is permitted to stand, it means that the serum plants in Nebraska that have received a United States government veterinary license have a monopoly of the right to sell hog cholera serum. The law not only seeks to give these serum plants a monopoly on the right to sell serum, but it attempts to fix the price by requiring the manufacturers to mark on the outside of the bottle the price at which it is sold, and then provides further that it is a misdemeanor for anyone to give or accept a rebate or commission on the serum sold. It creates a monopoly of the right to sell, and then makes it unlawful for them to change the price."

In *State ex rel.* v. *Smith*, 84 Pac. 851, the Supreme

Court of Washington held an Act providing for the licensing of plumbers in violation of the Fourteenth Amendment as affecting the privileges and immunities of citizens, and after reviewing the decisions at length the court concludes its opinion in these words:

> "We cannot close our eyes to the fact that legislation of this kind is on the increase. Like begets like, and every legislative session brings forth some new Act in the interest of some new trade or occupation. The doctor, the lawyer, the druggist, the dentists, the barber, the horseshoer, and the plumber have already received favorable consideration at the hands of our Legislature, and the end is not yet, for the nurse and the undertaker are knocking at the door. It will not do to say that any occupation which may remotely affect the public health is subject to this kind of legislation and control. Our health, our comfort, and our well-being are materially affected by all of our surroundings—by the houses we live in, the clothes we wear, and the food we eat. The safety of the traveling public depends in no small degree on the skill and capacity of the section crews that build and repair our railroads, yet are we on this account to add the architect, the carpenter, the tailor, the shoemaker, those who produce and prepare our food, and all the rest to the ever-growing list? If so, it will be but a short time before a man cannot engage in honest toil to earn his daily bread without first purchasing a license or permit from some board or commission. The public health is entitled to consideration at the hands of the legislative department of the government, but it must be remembered that liberty does not occupy a secondary place in our fundamental law. Under some of the Acts to which we have referred members of the board of health form part of the examining board, but our Act has not even this saving grace. By its terms two master plumbers and one journeyman plumber are constituted the guar-

dians of the public health and welfare. We are not permitted to inquire into the motive of the legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view. We are satisfied that the Act has no such relation to the public health as will sustain it as a police or sanitary measure, and that its interference with the liberty of the citizens brings it in direct conflict with the Constitution of the United States."

The Legislature of Arkansas passed an Act in 1929 patterned after and almost identical with the Act here involved. The validity of this Act was questioned in *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.* and *Arkansas Railroad Commission* v. *Castetter et al.*, 22 S. W. (2d) 993, and the Supreme Court of that State held the Act invalid insofar as it provided that the railroad commission should not issue certificates to anyone authorizing the manufacture, sale or distribution of ice at a given point where facilities already existing were sufficient to meet the public needs, and providing procedure for carrying the provisions into effect, etc., unconstitutional, and held that the declaration that the ice business is one properly the subject of governmental regulation was not arbitrary or unreasonable. The syllabus reading:

"Acts 1929, No. 55, p. 110, paragraph 15, providing that railroad commission shall not issue certificate to any person, firm or corporation authorizing manufacture, sale or delivery of ice at any given point where facilities already existing are sufficient to meet public needs, Section 16, providing procedure for carrying

provisions into effect, and Section 17, providing that joint operation of facilities for manufacture, sale or distribution of ice may be authorized where expenses may be thereby decreased, held to violate Const., Art. 2, paragraph 2, guaranteeing right to acquire and possess property, Section 3, providing no citizen shall be deprived of any right, privilege, or immunity, Section 18, prohibiting grant of privileges which upon same terms shall not belong equally to all citizens, Section 19, prohibiting monopolies and perpetuities, and Section 29, declaring that all laws contrary to provisions of article shall be void.

"Legislative declaration in Acts 1929, No. 55, p. 110, that ice business is one properly the subject of government regulation, is not arbitrary or unreasonable, and must be upheld by court."

The effect of this decision is that all who desire may engage in the ice business, but they are subject to governmental regulation as to their charges, practices, etc.

This case seems to have been based solely upon the provision of the State Constitution, and upon the assumption that the business was a monopoly.

No appeal provided.

The Act is void for another reason, which is that there is no appeal from the order of the Corporation Commission granting or refusing a license. The only provision for an appeal is found in Section 6 of the Act, which reads as follows:

"All and any orders made by said Commission fixing

> rates, charges, rules and regulations as to any person, firm or corporation engaged in the manufacture, sale or distribution of ice, or either of them, may be reviewed on appeal by the Supreme Court of the State of Oklahoma."

This provision is plain, and by it the only orders from which an appeal will lie are those fixing rates, charges, rules and regulations as to any person, firm, or corporation engaged in the business. There is no right of appeal from the action of the Commission in granting, or refusing, a license to engage in business. Hence the action of the Commission in granting, or refusing, a license is conclusive. By the provisions of Section 7 of this Act, if any person, firm or corporation engaged in the business without first obtaining a license they shall be deemed guilty of a misdemeanor, and any such person (but not a corporation) shall be fined $25.00 for each day's violation, and in addition to this, the Corporation Commission is granted the power to impose a fine of $500.00 for each of said violations. No appeal is allowed.

It is well settled that the right of appeal exists only where expressly given by constitutional provisions or legislative enactments, and the right cannot be extended to cases which do not come within the Constitution or statute. *Muskogee County et al.* v. *Muskogee Gas & Electric Co.*, 83 Okla. 167, and cases there cited.

In *Oklahoma Operating Co.* v. *Love et al.*, 252 U. S.

331, 40 Sup. Ct. Rep. 338, the Corporation Commission has made an order fixing rates for laundry work in Oklahoma City. An injunction was sought in the Federal court for the Western District, and was denied. On appeal to the Supreme Court the judgment was reversed, the court holding that:

> "Rev. Laws of Oklahoma 1910, Sec. 8235, construed by the State court as authorizing no review of the orders of the Commission fixing rates, except by an appeal in contempt proceedings for violation of the order, which violation may be punished by a penalty of $500.00 per day, is unconstitutional so far as it provides for the enforcement of the prescribed rates by penalties, because of the absence of an opportunity for a judicial review satisfying the constitutional requirements."

And in *Oklahoma Gin Company* v. *State of Oklahoma*, 255 U. S. 339, Sup. Ct. Rep. 341, the syllabus reads:

> "Rev. Laws Okla. 1910, Sec. 8235, so far as it provides penalties for disobedience of orders of the Corporation Commission fixing rates, violates the Fourteenth Amendment, because of the lack of any opportunity for judicial review of such orders."

It will be noted that the Legislature sought to remedy the defect invalidating the statute, by enacting what is now Sections 11046 and 11050, Comp. St. 1921, providing that in all cases where not otherwise provided by specific legislation, for actions arising under the anti-trust laws, and prosecuted before the Corporation Commission, to-wit: Section 45, Article 9, Constitution of Oklahoma, and Chap-

ter 79, Sections 8220-8241, both inclusive, Revised Laws of 1910, the same laws and rules as to procedure, notice and appeal shall apply as are prescribed for transportation and transmission companies in the Constitution of Oklahoma, and other laws of that State applicable thereto.

This statute can have no effect here, for by its terms it excepts cases provided for by specific legislation. Hence, we must look alone to Chapter 147, Session Laws 1925, to determine what remedy, if any, is afforded for a refusal to grant a license.

In *Grand Rapids & I. Ry. Co.* v. *Hunt,* 78 N. E. 358, the appellate court of Indiana held:

> "Under Acts 1905, p. 88, c. 53, paragraph 6, authorizing a railroad company to appeal to the Appellate Court from any 'rate, classification, rule, charge, or general regulation,' adopted by the railroad commission, no appeal lies to the Appellate Court from an order of the commission requiring the installation of an interlocking device at a crossing, the order not coming within the duties exercised by the commission as to 'rate, classification, rule, charge, or general regulation.'"

Counsel for appellant cite *Pioneer Telephone & Telegraph Co.* v. *State,* 40 Okla. 417; 138 Pac. 1033 as holding that an appeal lies. This case involved a transmission company, and an appeal is specifically provided for by Section 20, Article 9, of the State Constitution.

In *Baker* v. *Capshaw,* 130 Okla. 86, 65 Pac. 115 and *In Re Farmers Co-operative Gin Co.,* 122 Okla. 115; 251 Pac.

829, the court was dealing with the "Gin Act" Section 5 of which provides that the orders of the Corporation Commission "may be reviewed on appeal by the Supreme Court in the same manner, form, jurisdiction and procedure as applied to such orders made relative to transportation and transmission companies." The effect of this Act, so far as an appeal is concerned, is to place gins on a par with transportation and transmission companies.

In *Ex Parte Tindall,* 102 Okla. 192, 229 Pac. 125, cited by appellant, the court treated the petitioner as a "transportation company" and applied the rules of law applicable to such companies. This is made clear by the language used. The court said:

> "Bearing in mind that the business of petitioner is that of a 'transportation company' for hire, and therefore a 'public service enterprise' and subject to state control, keeping in mind, also that the state may exercise control over the public highways, and that this is a business seeking to appropriate the public highways to its own use as a roadbed, seeking to charge the public a profit for a service to be rendered over the public highways, there is no merit in the contention that the state, within the sphere of its police power, cannot exercise a reasonable control over such business."

None of the cases cited by appellant are controlling here. The ice act is complete within itself and we must, it seems to us, look to that act alone to determine whether a review is provided for.

The penalties imposed for the violation of the Act are so severe as to render the Act unconstitutional.

It is apparent, from the language used, that it was the purpose of the Act to prevent an appeal from the action of the Commission in refusing a license, and to impose penalties so enormous and sereve as to intimidate persons who had been denied a lecense from resorting to the courts to test the validity of the Act, for the only way in which the validity of the Act could be questioned would be by a violation thereof, which would subject one to prosecution for a misdemeanor, and a fine of $25.00 per day, by the courts, and a fine of $500.00 per day by the Commission, if he should be wrong in his contention that the Act was unconstitutional.

If what we have said is true, then the Act is violative of the Fourteenth Amendment to the Constitution of the United States, in that it deprives one of his property without due process of law and denies him the equal protection of the laws. It is also violative of Section 6 and Section 7 of Article 2 of the Constitution of the State of Oklahoma.

In *Ex Parte Young,* 209 U. S. 123, 28 Sup. Ct. 441, it is held:

> "4. A statute providing for the establishment of rates for railroad transportation without giving the corporation an opportunity to be heard, which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to

the courts to test the validity of the rates, it unconstitutional, as depriving the corporations of the equal protection of the laws." (The question is discussed at length in the body of the opinion.)

In *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 33 Sup. Ct. 961, it is said:

"The imposition of Kansas Laws 1905, Chap. 353, of a liability of $500.00 as liquidated damages, together with a reasonable attorney's fee, for every charge by a common carrier in excess of the rates therein fixed for the shipments of oil betwen points in the State, takes property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution."

In the body of the opinion the court says:

"The State court, although recognizing that the solution of the problem is not free from difficulty, reached the conclusion that 'So long as the defendant (the carrier) cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the Federal Constitution are not infringed.' But that this view fails to recognize the real plight of the carrier is made plain by the following extract from the opinion in *Ex Parte Young*, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 765:

"'If the law be such as to make the decision of the Legislature or of a Commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Coms. Rep. 209, 10 Sup. Ct. 462, 702.

"'A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the

right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of the laws which deeply affect its rights.'"

In *Wadley Southern Railway Co.* v. *State of Georgia*, 235 U. S. 651, 35 Sup. Ct. Rep. 214, the third syllabus reads as follows:

"A state statute under which enormous penalties are imposed upon a railway company for violating lawful administrative orders of the State railroad commission is void under the U. S. Const., 14th Amend., although such orders are made after full hearing before the commission, if access to the courts to test the constitutional validity of the commission's orders is denied, or if the right of review actually given is one of which the carrier may avail itself only at the risk of having to pay such penalties if the order is found to be valid."

If Chapter 147, Session Laws of 1925, is valid, there is no limitation upon the power of the Legislature to regulate, control or prohibit any business, conducted in such a manner as to make it of public consequence or to effect the community at large as to supply, demand or price or rate thereof. All that is necessary is an Act placing any business under the jurisdiction of the Corporation Commission, for, "In a sense, the public is concerned about all

lawful business because it contributes to the prosperity and well-being of the people." *Chas. Wolff Packing Co.* v. *Court of Industrial Relations, supra.*

We will not attempt to here discuss the numerous cases cited by appellant which, to our minds, have no bearing upon the issues in this case, but will merely refer briefly to the principal cases upon which the appellant relies as authority for bringing this suit.

Its contention that it has franchise rights, which will be violated if the defendant is permitted to engage in business in competition with it, is based upon *Frost v. Corporation Commission*, 278 U. S. 515, 49 Sup. Ct. Rep. 245, wherein the court was construing the statutes of the state relating to cotton gins. Section 3712, Comp. Statutes 1921, declared cotton gins to be public utilities, and the operation of the same for the purpose of ginning seed cotton to be a public business, and Section 3713, provided that no person or corporation in the state should operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the Corporation Commission, etc. In discussing the question there presented the court said:

> "It already appears that cotton gins are declared by the Oklahoma statute to be public utilities, and their operation for the purpose of ginning seed cotton to be public business. No one can operate a cotton gin for such purpose without securing a permit from the Commission. In their regulation and control, the Commis-

sion is given the same authority which it has in respect of transportation and transmission commissions, and the same power to fix rates, charges and regulations. Comp. Stats. 1921, paragraphs 2713, 3713, 3715. Under section 3714, as amended, *supra* (laying the proviso out of consideration for the moment), the commission may deny a permit for the operation of a gin where there is no public necessity for it, and may authorize a new ginning plant only after a showing is made that such plant is a needed utility. Both parties definitely concede the validity of these provisions, and, for present purposes, at least, we accept that view."

It will be observed from this language that the validity of the act declaring cotton gins public utilities was definitely conceded by both parties. The court called attention to this fact, and stated that for the purpose of that case that view was accepted. This statement of the court, to our mind, indicates that the court doubted the validity of the act, but inasmuch as the question of the validity thereof was not raised, but was conceded, it merely construed the statute.

The right of the legislature to declare a private business a public one was not involved in that case.

Counsel for appellant admitted at the trial that its alleged "franchise" was not exclusive, and it could not be reasonably contended that this license was an exclusive [illegible] We would sustain the act as violative [illegible] Article 2 of the Constitution of the State,

"Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. * * *." See *City of Okmulgee* v. *Okmulgee Gas Co.*, 282 Pac. 641.

and of Section 7 of Article 18 of the State Constitution, providing:

"and no exclusive franchise shall ever be granted,"

and of Section 5, Article 18 of the Constitution, which provides that:

"No municipal corporation shall ever grant, extend or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits, etc. * * *,"

and said act violates Section 51, Article 5 of the State Constitution, which reads:

"The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State,"

and said act violates Section 2 of Article 2 of the Bill of Rights, which reads:

"All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."

See *State ex rel. Short, Attorney General*, v. *Riedell et al.*, 109 Okla. 35, as well as Section 7, Article 2, providing:

"No person shall be deprived of life, liberty, or property without due process of law."

In *Chickasha Cotton Oil Company* v. *Cotton County Gin Company*, 40 Fed. (2d) 846, cited by appellant, the

Court held the "Gin" law valid, basing its decision upon the fact that the legislature had by the act declared cotton gins to be public utilities, and upon the nature of the service rendered. In the course of the opinion by Judge Phillips, it is said:

> "Cotton farmers, as a class, are not financially independent. An ordinary cotton farmer cannot afford to own and operate his own gin. Because his margin of profit is small, he cannot afford to haul his cotton a great distance to have it ginned. He must patronize a cotton gin located within accessible distance to his farm."

There is no similarity between the service rendered by a cotton gin, and the manufacture, sale and distribution of ice.

The cotton gin merely renders a service for a stated charge. In rendering this service its business compares with that of the threshing machine. It does not manufacture, or sell, anything, but merely separates the seed from the lint cotton and bales the lint for the owner. A gin is built and the business conducted solely to furnish this service to the public. The cotton grower can gin his cotton in no other way.

The manufacturer of ice does not render a service. He manufactures and sells a commodity. He may sell, or refuse to sell, to whom he pleases. He may deliver his ice, or sell it at the plant. He is not compelled to sell, but may suspend or discontinue his operations at will. The business is a

common occupation, which may be engaged in by anyone. There is no distinction between the business of selling ice, and that of selling groceries, meats, bread, milk or any of the other necessities or conveniences of life. So common is the business that many persons manufacture ice for their own use, with individual plants in their homes (and a strict construction of the act in question will render all those who make their own ice guilty of a misdemeanor, unless they obtain a license from the Corporation Commission).

That the business of the manufacture, sale and distribution of ice was not a monopoly before the statute was passed is clear. Prior to the enactment of the act in question one could purchase ice from whom he pleased, and much cheaper than under the act. The evidence clearly shows that the business was not a monopoly, and the facts and circumstances clearly demonstrate that the sole purpose of the act is to protect the appellant, and a few other large interests, from competition, and that the act is being administered solely to that end is likewise clear.

The only attempt made to show that the business was monopolistic was that in various towns in the state there was but one ice plant, and the appellant's witness who testified to this fact, also testified that ice was shipped and hauled in trucks to the smaller places, and even delivered to the rural communities. It is in evidence that ice may be shipped by rail and hauled in trucks great distances, so it

is clear that the people in one community are not compelled to buy of their local dealer. The fact that because there is but one plant in some of the smaller towns, and none in others cannot make of it a public business. In many of the smaller towns there is but one drug store, one meat market, one grocery store and one garage, but that does not make these businesses public, or authorize the Legislature to regulate or prohibit them.

It is manifest that the declaration of the Legislature that the manufacture, sale and distribution of ice is a public business, does not make it such, and it is likewise manifest that if the "business of the butcher, the baker, the tailor, the wood chopper, the mining operator, or the miner," is not clothed with such a public interest that the price of his product or wages can be fixed by state regulation, that the business of the man who manufactures and sells ice is not clothed with a public interest. He is the manufacturer of his products, the same as the manufacturer of any other product manufactured and sold, and if the state has the right to control his business, and to say who shall and shall not engage in the business, then the business of the foundryman, the machine shop, the garage, the oil refiner, the grocer, the butcher, the druggist, the plumber, the shoe maker, the shoe shop and the shoe shining establishment may be controlled by the State through the Corporation Commission. In fact, there is no business which could not

be so controlled, or if the legislature should so decree, be prohibited.

The appellant introduced the report of the Corporation Commission in which this commission sought control of the ice business, and in its brief, insist that this is evidence of the nature of the business. If these reports are competent for any purpose, it is merely to show that the commission, like every other board or commission in the land, was anxious to bring to itself more power, and a wider range of jurisdiction. What effect have these recommendations upon the constitutionality of this law?

The appellant cites *City of Tombstone* v. *Macia*, 245 Pac. 677; *Holton* v. *City of Camilla*, 68 S. E. 472 and *City of Denton* v. *Denton Home Ice Co.*, 18 S. W. (2nd) 608, holding that a municipal ice plant constitutes a public purpose for taxation, and while those cases have little or no bearing upon the question here presented, because the question of the right of the individual to engage in business was not involved, we may cite *Union Ice & Coal Co.* v. *Ruston*, 135 La. 898, 66 So. 262; *State* v. *O'Rear*, 227 Mo. 303, 210 S. W. 392; *State* v. *Thompson*, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339, Ann. Cas, 1913C 744, as holding that a municipal ice plant does not constitute a public purpose for taxation.

The Supreme Court of Georgia in *Hilton* v. *Camilla*, *supra*, based its decision largely on the proposition that if

a waterworks delivering water through pipes constitutes a public utility, then a plant delivering frozen water (ice) by wagons is likewise a public utility. This reasoning is so strikingly answered by the Louisiana court in *Union Ice & Coal Co.* v. *Ruston, supra,* that we quote briefly from that case:

> "The same line of reasoning here adopted by the Supreme Court of Georgia having been presented incidentally by counsel in the case of *State* v. *Thompson,* 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339, Ann. Cas. 1913C 774, in the Supreme Court of Wisconsin, Judge Timlin, in a concurring opinion, made the following answer to it:
>
> "'It was said by counsel in argument that the furnishing of water by a city to its inhabitants is a municipal affair; that ice is but frozen water; hence the furnishing of ice must be a municipal affair. But things which are similar from a physical or chemical viewpoint may be dissimilar from the legal viewpoint. Under a statute authorizing a city to buy coal, it probably could not buy diamonds, although it is said that they are chemically identical. NEITHER IS ATMOSPHERIC GAS PASSED THROUGH A VARYING APERTURE AND ARTICULATED BY VARYING CONTACTS ALWAYS EQUIVALENT TO ARGUMENT. The difference between the collection and distribution of water by means of pipes laid in the streets and the manufacture, sale and distribution of ice is that the first is in the nature of a monopoly, while the second is a competitive business enterprise. The first does not depend so largely upon skill in management.'
>
> "Putting aside the frozen water argument of the Georgia court as having been well answered by the amusing witticism of the Wisconsin court, we note that, as pointed out by the Wisconsin court, all analogy

between the municipal distribution of water and the municipal distribution of ice is destroyed by the fact that for the one business pipes have to be laid in the public streets, and necessarily for doing this, the streets have to be torn up and disturbed, whereas the other is a purely competitive business enterprise. There would be analogy betwen the two if the city were to abandon the sovereign mode of water distribution by means of underground conduits through the public streets, and to peddling the liquid as is done in towns unprovided with water works and unblessed with a sufficient rainfall for gathering a supply in cisterns, as has to be done with ice. There would then be complete analogy; but everybody would then see that the town was no longer discharging a sovereign function, but carrying on a private enterprise."

We will not further comment upon the cases cited by appellant. These cases are not conclusive, nor even persuasive here.

Appellant complains of the action of the Circuit Court of Appeals in referring to the Ice Blue Book wherein it is shown that the price of ice is higher in Oklahoma than in eleven other southern states. This book is a standard authority, is the official publication of the National Association of Ice Industries, of which association L. C. Smith, one of appellant's chief witnesses, was secretary and the information therein contained can be relied upon as being correct.

The information contained in this book shows the beneficial effect the Ice Act has had upon the ice industry in

Oklahoma, and shows the injurious effect the Act has had upon the public.

We challenge the statement of the appellant that the record shows a decline in the price of ice, improvement in the service, kind, quality and character of ice after the passage of the Act, but on the contrary we assert that the record shows that the price of ice increased after the Act took effect, and that now the price of ice is greater in this state than in the eleven other southern states mentioned, in none of which is competition in the business prohibited.

We desire to call the court's attention to facts we deem significant, which are that there is not a word in the record indicating that the Corporation Commission has at any time since the passage of the Act fixed the price of ice, and that the improved conditions testified to by appellant's witness Hill, were brought about by the acts of the manufacturers without the aid of the Corporation Commission.

The business of the packing plant is not such a business as is affected with a public interest, *Wolff Packing Co.* v. *Court of Industrial Relations of Kansas, supra.* Yet meat is a necessity, and used by all. The creamery business is not clothed with a public interest, *Fairmont Creamery Co.* v. *State of Minnesota, supra,* though we all use butter. The business of the baker is not clothed with a public interest though it is more necessary to life than ice, *Burns Baking Co.* v. *Bryan, supra.* The business of manufacturing bed

clothing is private, regardless of a legislative declaration to the contrary, *Weaver* v. *Palmer Bros. Co., supra.* The drug store remains the property of its owner, and the business is not affected with a public interest, *Louis K. Liggett Co.* v. *Baldridge et al., supra,* and the manufacture and sale of gasoline is not affected with a public interest, *Williams* v. *Standard Oil Co., supra,* regardless of the fact that it furnishes the motive power with which the individual may transport the commodities mentioned to his home, and regardless of the fact that it is universally used to transport ice from the plant to the consumer.

The Act, on its face, shows that it bears no reasonable relation to any evil sought to be prevented; that its purpose is not to protect the public, or to regulate any business that is injurious to the health, morals or welfare of the people, but that its sole purpose is to create and foster a monopoly in the ice business of which the appellant is one of the chief beneficiaries. That the act is so administered is clear from the appellant's evidence. Prohibition and not regulation is the purpose and effect of the act.

We are not ready to concede that the State has the right or power to regulate and control the private business of its citizens, or to prohibit, or authorize the Corporation Commission to prohibit its citizens, or any of them, from engaging in a lawful occupation. If it has this right, then the guaranties embodied in the Fourteenth Amendment to

the Federal Constitution have been withdrawn from those of us who are unfortunate enough to reside in this State.

We submit that the Act in question is unconstitutional, inoperative and void, and that the judgment of the Circuit Court of Appeals should be affirmed.

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